

The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

C.P., by and through his parents, Patricia Pritchard and Nolle Pritchard on his own behalf and on behalf of similarly situated others; and PATRICIA PRITCHARD,

Plaintiffs,

v.

BLUE CROSS BLUE SHIELD OF ILLINOIS,

Defendant.

No. 3:20-cv-06145-RJB

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR CLASSWIDE DECLARATORY AND PERMANENT INJUNCTIVE RELIEF AND AWARD OF INDIVIDUAL NOMINAL DAMAGES TO PLAINTIFFS C.P. AND PRITCHARD

**Note on Motion Calendar:
March 3, 2023**

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I. INTRODUCTION

The Court may use all of its equitable powers to remedy illegal discrimination for class members, having concluded that Defendant Blue Cross Blue Shield of Illinois (“BCBSIL”) discriminates on the basis of sex when it administers the Exclusions. *See* Dkt. No. 148.

Courts have “wide discretion in exercising their equitable powers to fashion the most complete relief possible” to restore those injured to where they would have been, but for the unlawful discrimination. *Sangster v. United Air Lines, Inc.*, 633 F.2d 864, 867 (9th Cir. 1980); *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 868 (9th Cir. 2014) (“the district court had broad powers to tailor equitable relief so as to vindicate the rights” protected under Title IX). This is true for sex discrimination found pursuant to Section 1557. *See, e.g., Fain v. Crouch*, 2022 U.S. Dist. LEXIS 137084, at *45 (S.D. W. Va. Aug. 2, 2022) (enjoining defendants “from enforcing or applying [a gender-affirming care] exclusion” under Section 1557); *Flack v. Wis. Dep’t of Health Servs.*, 395 F. Supp. 3d 1001, 1003 (W.D. Wis. 2019) (same); *Boyden v. Conlin*, 341 F. Supp. 3d 979, 1005 (W.D. Wis. 2018) (plaintiffs have a right to pursue equitable relief for violations of Section 1557). The Court should order the declaratory, injunctive, and equitable relief requested by the Plaintiff Class, and the nominal damages sought by C.P. and his mother, Patricia Pritchard, on their own behalf.

II. ARGUMENT

A. Declaratory Judgment and Nominal Damages for C.P. and Ms. Pritchard Should Be Entered.

BCBSIL does not address and therefore waives any objection to the Class’s proposed declaratory judgment and award of nominal damages to C.P. and Ms. Pritchard. *See* Dkt. No. 161.

1 **B. Injunctive Relief Should Be Ordered.**

2 All of BCBSIL's objections are meritless:

3 **1. Wit Is Inapplicable.**

4 BCBSIL continues to argue that the decision in *Wit v. United Behav. Health*, 2023
5 U.S. App. LEXIS 2039, *26 (9th Cir. Jan. 26, 2023), prevents the Court from issuing
6 injunctive relief that requires reprocessing, even while it concedes that *Wit* only applies
7 to ERISA claims. Dkt. No. 161 at 1 (acknowledging that *Wit* applies only "in the ERISA
8 context"). The *Wit* holding is far more limited, concluding that 29 U.S.C. § 1132(a)(1)(B)
9 does not provide for injunctive relief. *Id.*, 2023 U.S. App. LEXIS 2039 at *26. To expand
10 *Wit's* scope to apply to all of ERISA and Section 1557, BCBSIL makes the wholly
11 unsupported claim that "what is true for ERISA is true for Section 1557." *Id.* at 2. BCBSIL
12 offers no citation for this because none exists. As argued previously (*see* Dkt. Nos. 153
13 and 158), *Wit* does not apply to Section 1557. Nothing in ERISA limits the remedies
14 available under Section 1557. 29 U.S.C. § 1144(d); Dkt. No. 148 at 20.

15 **2. Cummings and Barnes Confirm That Equitable Relief Is**
16 **Available under Section 1557 and Title IX.**

17 BCBSIL argues that *Cummings v. Premer Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1574
18 (2022), demonstrates that injunctive relief (including reprocessing) is an "idiosyncratic
19 or exceptional" remedy under Section 1557. Dkt. No. 161 at 2. BCBSIL did not read the
20 case closely. In *Cummings*, the Supreme Court *reaffirmed* that Section 1557 provides for
21 injunctive relief. *See id.* at 1568 ("private plaintiffs may secure injunctive or monetary
22 relief in such suits").

23 Nor does *Barnes v. Gorman*, 536 U.S. 181, 187 (2002), assist BCBSIL. In *Barnes*, the
24 Supreme Court concluded that "where legal rights have been invaded, and a federal
25 statute provides for a general right to sue for such invasion, *federal courts may use any*
26 *available remedy to make good the wrong done.*" *Id.* at 189 (emphasis added). In *Barnes*,

1 just like in *Cummings*, the Supreme Court specifically mentioned injunctive relief as a
2 form of traditional contract remedy that is available under Title IX. *Id.* at 187.

3 **3. No Adequate Remedy at Law.**

4 The Ninth Circuit holds that the loss of access to medically necessary health
5 coverage is “irreparable harm” which is often “indistinguishable” from the lack of an
6 adequate remedy at law. *M.R. v. Dreyfus*, 663 F.3d 1100, 1115 (9th Cir. 2011); *Mitchell v.*
7 *3PL Sys.*, 2013 U.S. Dist. LEXIS 199123, at *12-13 (C.D. Cal. Apr. 8, 2013). Here, as in other
8 cases involving medical treatment, “monetary damages proposed by Defendants will
9 not ... cure the medical harms caused by the denial of timely health care.” *Karnoski v.*
10 *Trump*, 2017 U.S. Dist. LEXIS 203481, at *29-30 (W.D. Wash. Dec. 11, 2017); *see also Flack*
11 *v. Wis. Dept. of Health Servs.*, 328 F. Supp. 3d 931, 946 (W.D. Wis. 2018) (same).

12 BCBSIL’s reliance on *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996), is misplaced.
13 *Varity* is another ERISA case that interpreted the narrow scope of available remedies
14 under 29 U.S.C. § 1132(a). It does not address equitable relief available under Title IX,
15 or Section 1557.

16 **4. The Balance of the Hardships Favors the Class.**

17 BCBSIL argues that the Court should permit it to continue to violate Section 1557
18 because an injunction would burden BCBSIL and provide an advantage to its
19 competitors. Dkt. No. 161 at 5. BCBSIL provides no evidence of any such “burden.”¹

20 BCBSIL experiences no “burden” when it is ordered to comply with the law.
21 *BMW of N. Am., LLC v. Rocco*, 2020 U.S. Dist. LEXIS 217040, at *34 (C.D. Cal. Nov. 18,
22 2020); *Deckers Outdoor Corp. v. Ozwear Connection Pty, Ltd.*, 2014 U.S. Dist. LEXIS 132169,
23

24
25 ¹ BCBSIL’s claim that competitors will continue to discriminate in the face of the proposed
26 declaratory and injunctive order is dubious. The proposed Order, if issued, will likely motivate other
TPAs subject to Section 1557 to cease similar discriminatory practices.

1 at *32 (C.D. Cal. Sep. 18, 2014). That BCBSIL’s competitors may continue to engage in
2 illegal discrimination does not excuse BCBSIL.

3 **5. Equitable Tolling Is Proper.**

4 Equitable tolling is an appropriate remedy for illegal discrimination when (a) the
5 class member diligently pursued their claim; (b) they were misinformed about the claim
6 by defendant; and (c) they relied upon that misinformation, causing them to fail to
7 exhaust any administrative remedies. *Rodriguez v. Airborne Express*, 265 F.3d 890, 902
8 (9th Cir. 2001); *see also, Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1052 (9th Cir. 2013). All of
9 the grounds for equitable tolling are met:

10 *First*, by definition, each class member diligently pursued coverage by
11 submitting pre-service requests or post-service claims for gender-affirming care that
12 were denied by BCBSIL based upon the Exclusions (rather than, for example,
13 untimeliness).

14 *Second*, each class member’s denial was based on BCBSIL’s decision to
15 administer the discriminatory exclusions; each is entitled to have their claims
16 administered without discrimination. Thus, each class member was misinformed about
17 their claims when they received the denial.

18 *Third*, relying on those denials, class members were entitled to conclude that any
19 further claims submission or appeal by class members was futile. *See* Dkt. Nos. 155 and
20 159. Indeed, BCBSIL’s Rule 30(b)(6) witnesses testified that it administered the
21 Exclusions the same way every time, denying coverage if the service was determined to
22 be related to “gender dysphoria” based solely on the diagnostic and procedural codes
23 in the claims. Dkt. No. 84-6 at 69:8-71:4; Dkt. No. 84-9 at 40:17-22 (gender dysphoria is
24 the condition that triggers the application of the Exclusions). Appeal was futile (but
25 exhausted by C.P.). *Aleknagik Natives, Ltd. v. Andrus*, 648 F.2d 496, 499 (9th Cir. 1980).

1 Ignoring both the undisputed facts and established caselaw, BCBSIL argues that
 2 *Wit* and various ERISA cases prohibit the use of “equitable tolling” as a remedy here.
 3 Dkt. No. 161 at 7-8. But this is not an ERISA case and, as this Court has already
 4 concluded, ERISA does not limit or narrow the broad remedies available under
 5 Section 1557. Dkt. No. 148. Even under ERISA, appeal was futile. *See Horan v. Kaiser Steel*
 6 *Ret. Plan*, 947 F.2d 1412, 1416 (9th Cir. 1991) (where a defendant establishes its position
 7 unequivocally, exhaustion may be waived).²

8 BCBSIL also argues that class members who timely submitted their claims and
 9 pre-service authorizations, only to be denied due to BCBSIL’s discrimination, should
 10 remain subject to the original appeal timelines because, under ordinary circumstances,
 11 those appeal timelines would be reasonable and fair. Dkt. No. 161 at 16-17. BCBSIL asks
 12 the wrong question. The issue here is not whether, in theory, the BCBSIL timelines are
 13 reasonable. The real question in this remedies phase is: having found that BCBSIL
 14 engaged in illegal discrimination, what equitable remedies may the Court use to undo
 15 the injury? Equitable tolling is an available remedy that the Court can and should use
 16 to vindicate class members’ rights.

17 This Court’s decision in *Thornton v. Comm’r of Soc. Sec.*, 570 F. Supp. 3d 1010 (W.D.
 18 Wash. 2020), is instructive. In *Thornton*, the Court was presented with an unlawful
 19 categorical policy that led to the denial benefits to class members. After certifying the
 20 class and holding that the policy was unconstitutional, the Court held that “it would be
 21 futile to require exhaustion” of the internal appeals processes of the Social Security
 22 Administration given its “*blanket* refusal to consider claims for survivor’s benefits,”
 23 and that the “the 60-day limitation on filing a district court appeal” should be waived
 24

25 ² BCBSIL cites to *Comm’n Workers of Am. v. AT&T*, 40 F.3d 426, 432 (1994), for its argument that
 26 exhaustion by absent class members should not be excused. *See* Dkt. No. 161 at 16. That case is consistent
 with *Horan*, holding that exhaustion is waived when it is “clearly useless.” *Id.*

1 based on “the equities in th[e] case.” *Id.* at 1025–26. Indeed, the Court noted that “[i]t
2 makes little sense to waive the exhaustion requirement but strictly enforce the
3 limitations period,” as BCBSIL appears to request. *Id.* at 1026. The Court should do the
4 same here.

5 BCBSIL also argues that class members, like C.P. and M.N., who submitted pre-
6 authorization requests and were denied by BCBSIL, should have submitted post-service
7 claims, arguing that the pre-service authorization requests were not “sufficient to
8 apprise” BCBSIL of the class members’ claims. Dkt. No. 161 at 16. This is not true. *First*,
9 even under ERISA, a denial of a pre-service authorization request is equivalent to a post-
10 service denial; both are “adverse benefit determinations.” 29 C.F.R. § 2560.503-1(m)(2)-
11 (4). *Second*, having been denied pre-service, class members need not submit post-service
12 claims when to do so would be futile. *See Desert Outdoor Advert. v. City of Moreno Valley*,
13 103 F.3d 814, 818 (9th Cir. 1996). Class members with pre-service denials did not need
14 to do anything further to apprise BCBSIL of their claims.

15 **C. Class Notice Should Be Ordered at BCBSIL’s Expense.**

16 The class notice sought here is a form of equitable relief. *See, e.g., Thornton v.*
17 *Comm’r of Soc. Sec.*, 2020 U.S. Dist. LEXIS 220711, at *4-5 (W.D. Wash. Nov. 24, 2020);
18 *Z.D. v. Grp. Health Coop.*, 2012 U.S. Dist. LEXIS 76498, at *35 (W.D. Wash. June 1, 2012);
19 *Elkins v. Dreyfus*, 2011 U.S. Dist. LEXIS 86782, at *34 (W.D. Wash. Aug. 5, 2011).

20 If the Court orders declaratory and injunctive relief, class members must be
21 notified of the Court’s decision, or there is no meaningful way for class members to be
22 informed of and exercise the rights awarded. Class notice in this instance is required,
23 not for due process purposes (since there is no ability to opt out of the injunctive class),
24 *but as a remedy*. *See, e.g., EEOC v. DCP Midstream, L.P.*, 608 F. Supp. 2d 107, 112 (D. Me.
25 2009) (in discrimination case, injunctive relief included remedial notice by defendant).
26

1 Here, where the Class has prevailed on the merits, the cost of such remedial notice is
2 properly borne by BCBSIL, the non-prevailing party in this fee- and cost-shifting case.

3 **D. Scope of Injunction Is Proper.**

4 BCBSIL objects to the scope of the proposed injunctive order including BCBSIL's
5 "agents, employees, successors and all others acting in concert with them" as violating
6 Rule 65(d)(2) because it extends beyond the class and is too vague. Dkt. No. 161 at 11-
7 12. The Class disagrees but is open to wording that addresses BCBSIL's concerns. The
8 injunctive order to be issued by the Court should enjoin "BCBSIL, Health Care Services
9 Corporation (of which BCBSIL is a division), and their agents or others under their
10 control" from administering the Exclusions that are part of the class definition. Plaintiff
11 Class agrees that the injunctive order does not reach non-party employers. An amended
12 proposed Order is filed with this reply.

13 **III. CONCLUSION**

14 The Court should order the proposed declaratory judgment, nominal damages
15 for C.P. and Ms. Pritchard, and injunctive and other equitable relief sought by the Class.

16 DATED: March 3, 2023.

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*I certify that the foregoing contains 2,083 words,
in compliance with the Local Civil Rules.*

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

C.P., by and through his parents, Patricia Pritchard and Nolle Pritchard on his own behalf and on behalf of similarly situated others; and PATRICIA PRITCHARD,

Plaintiffs,

v.

BLUE CROSS BLUE SHIELD OF ILLINOIS,

Defendant.

NO. 3:20-cv-06145-RJB

[AMENDED PROPOSED]
ORDER GRANTING PLAINTIFFS’
MOTION FOR CLASSWIDE
DECLARATORY AND PERMANENT
INJUNCTIVE RELIEF, AND
INDIVIDUAL NOMINAL DAMAGES
FOR THE NAMED PLAINTIFFS

**Note on Motion Calendar:
March 3, 2023**

THIS MATTER having come before the Court upon the Plaintiffs’ Motion for Classwide Declaratory and Permanent Injunctive Relief, and Individual Nominal Damages for the Named Plaintiffs, and the Court having considered the Motion and the pleadings in this matter, and it appearing to be in the best interest of the case, therefore,

IT IS HEREBY ORDERED that Plaintiffs’ Motion is GRANTED.

Specifically, in accordance with Fed. R. Civ. P. 65(d)(1), and the Court’s Order on the cross motions on summary judgment (Dkt. No. 148), classwide declaratory and permanent injunctive relief is ordered in order to ensure that class members may have their past, present, and future claims for gender-affirming care adjudicated by BCBSIL

1 without the administration of the discriminatory categorical exclusions of gender-
2 affirming care (the “Exclusions”).

3 The specific terms of the classwide declaratory and injunctive relief are as follows:

4 1. ***Declaratory Judgment.*** The Court declares and issues a final judgment that
5 Blue Cross Blue Shield of Illinois (“BCBSIL”), Health Care Services Corporation
6 (“HCSC”) (of which BCBSIL is a division), and their agents or others under their control,
7 violated Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116(a), and discriminated
8 on the basis of sex against Plaintiff C.P. and the Plaintiff Class when it administered and
9 enforced the Exclusions. As a “health program or activity” subject to Section 1557,
10 BCBSIL and HCSC cannot discriminate in any of their activities, including, but not
11 limited to, activities as a third-party administrator.

12 2. ***Prospective Permanent Injunction.*** BCBSIL, HCSC, and their agents or
13 others under their control are hereby PERMANENTLY ENJOINED from administering
14 or enforcing the Exclusions and any policies or practices that wholly exclude or limit
15 coverage of gender-affirming care in any class members’ ERISA self-funded health plans,
16 so long as BCBSIL and/or HCSC are a “health program or activity” under the ACA’s
17 Section 1557, 42 U.S.C. § 18116(a);

18 3. ***Retrospective Equitable Relief.*** The Court further ORDERS the following
19 retrospective equitable relief:

20 (a) ***Equitable Tolling.*** BCBSIL, HCSC, and their agents or others under
21 their control are enjoined from applying the original time limits in
22 class members’ health plans for submitting claims or appealing
23 adverse benefit determinations, but only as to claims for gender-
24 affirming care that were denied based upon the Exclusions and
25 during the class period. Class members will have 12 months from
26 the date the class notice is mailed to submit claims for gender

1 affirming care that are associated with denials for pre-authorization
2 and/or post-service denials based upon the Exclusions.

3 (b) **Claims Processing.** BCBSIL, HCSC, and their agents or others under
4 their control shall accept, process, and pay these claims consistent
5 with the terms of the plans and the Administrative Services
6 Agreements, subject to this Order and without administering the
7 Exclusions.

8 (c) **Class Notice and Distribution.** BCBSIL, HCSC, and their agents or
9 others under their control shall cause to be distributed to class
10 members, at its own expense, a Court-approved Notice regarding
11 this Order. Class counsel shall also post the Court-approved Notice
12 on its website. Class counsel shall draft a proposed notice, in
13 consultation with BCBSIL counsel. An agreed-upon notice shall be
14 provided to the Court for review no later than March 2023.
15 BCBSIL shall create and provide to class counsel its plan for
16 identifying class members and sending them the Notice required by
17 this Order, including efforts to identify and correct bad addresses
18 for class members and send or resend them the Notice at the
19 corrected address(es). BCBSIL shall provide this plan to class
20 counsel no later than 14 days following the signing of this Order. If
21 class counsel disagrees with the plan, the parties shall meet and
22 confer to attempt to resolve the matter in good faith. Should the
23 parties be unable to reach agreement on the contents of the Notice
24 or the plan for its distribution to class members, each party may
25 submit their proposed Notice and/or proposed distribution plan to
26 the Court by the above-listed date by which the parties must

1 otherwise provide an agreed-upon Notice to the Court. No briefing
2 is permitted regarding the form of the class Notice or the nature of
3 the Notice distribution plan.

4 In addition to the classwide declaratory and injunctive relief, the Court ORDERS
5 an award of individual nominal damages in the amount of \$1 to Plaintiffs C.P. and
6 Patricia Pritchard. This award of individual nominal damages does not preclude
7 Plaintiffs from seeking injunctive and equitable relief pursuant to this Order (i.e.,
8 processing of the previously denied claims for gender-affirming care). Nor shall the
9 award of nominal damages be interpreted as a determination by the Court that Plaintiffs
10 failed to offer credible proof of actual damages resulting from BCBSIL's denying C.P.'s
11 claim for gender-affirming care based upon its administration of the Exclusions in
12 violation of Section 1557 of the ACA.

13 DATED this _____ day of March 2023.

14
15 _____
16 Robert J. Bryan
17 United States District Judge

18 Presented by:

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